No. 95-891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF OHIO,

Petitioner,

—v.—

ROBERT D. ROBINETTE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE OHIO SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The ACLU of Ohio is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

STATEMENT OF THE CASE

The facts are not contested. On August 3, 1992, Deputy Roger Newsome of the Montgomery County Sheriff's Department was on drug interdiction patrol on Interstate 70 when he stopped respondent, Robert Robinette, for speeding through a construction zone. Following his usual practice, Newsome had already decided to issue respondent a verbal warning before even approaching respondent's car. Pet. App.2.

After obtaining respondent's driver's license and determining that there were no outstanding warrants or violations, Newsome asked respondent to exit his vehicle and stand between his car and Newsome's cruiser. Newsome then activated his cruiser's video camera to videotape the encounter with respondent. As he had planned from the outset, Newsome warned respondent about speeding and returned his driver's license. This did not, however, end the encounter. Rather, Newsome continued: "One question be-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

fore you get gone [sic]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[2] Pet.App.2.

Respondent gave a negative reply to Newsome's inquiry about contraband. Newsome nevertheless asked for permission to search respondent's car. Respondent testified at the suppression hearing that he was shocked at Newsome's request to search the car and "automatically" answered "yes." Newsome testified that he routinely asked permission to search the cars of motorists he had stopped. Pet.App.2-3; J.A.18-20, 26-27. After searching respondent's car, Newsome found a small amount of marijuana and a pill, later identified as methylenedioxy methamphetamine, which was the basis for respondent's arrest and indictment under Ohio Rev. Code Ann. §2925.11(A)(Supp. 1996). Pet.App.3.

The trial judge denied respondent's motion to suppress the evidence found in his car but the court of appeals reversed. The appellate court ruled that "a reasonable person in [respondent's] position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions." Because there was no reasonable suspicion to continue detaining respondent, the court of appeals held that the consent obtained from respondent was the fruit of an unlawful detention. Pet.App.17-18.

The Ohio Supreme Court affirmed the appellate court's ruling. The court concluded that the search was invalid "since it was the product of an unlawful seizure." *Id.* at 4. It found that "the entire chain of events, starting when Newsome had [respondent] exit the car and stand within the field of the video camera, was related to the questioning of [respondent] about carrying contraband." This questioning "was not related to the initial speeding stop and . . . was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure of [respondent and his passenger.]" *Id.* at 6-7.

[2] Newsome also questioned respondent about luggage inside respondent's car.

The court explained that "[m]ost people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them." To secure the constitutional rights of motorists seized by the police, the court below ruled that "citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase 'At this time you legally are free to go' or by words of similar import." *Id.* at 9.

In this Court, the state and its *amici* contend that the court below erred in imposing a bright-line rule for judging whether respondent's detention continued at the time that Deputy Newsome requested and obtained consent to search the car. Petitioner argues that a totality of the circumstances test is the correct standard for determining whether the encounter between respondent and Newsome was consensual *vel non*.

SUMMARY OF ARGUMENT

This Court's cases recognize that "[s]treet encounters between citizens and police officers are incredibly rich in diversity." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Ignoring that diversity, the petitioner argues that this case should be treated no differently than an encounter between the police and a citizen walking down the street. Such an encounter is deemed to be an "arm's length" meeting. Absent some restraining action by the officer, the law presumes that the cit-

izen is free to answer the officer's questions or walk away, and that the average person is aware of these options and thus has not been seized under the Fourth Amendment.

The court below correctly recognized that this constitutional paradigm is inapposite when the police stop a motorist on the highway. Under these circumstances, a seizure has unquestionably occurred. Moreover, once a seizure has occurred (as in respondent's case), the encounter between the police and citizen is no longer a balanced meeting. The nature of the confrontation not only may cause "substantial anxiety" for the motorist, *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), the officer's conduct and discretion also dictate the pace and resolution of the encounter. Unlike the pedestrian free to ignore an approaching officer, a motorist seized by the police is not positioned to know the lawful limits of the officer's authority, nor the existence of his own right to leave or terminate the seizure. Accordingly, the totality test of the consensual encounter cases is unsuited for judging the legality of an officer's continued questioning of a motorist subject to police seizure.

This Court's cases also reveal that bright-line rules are appropriate to delineate the constitutional boundaries of traffic stops. Many of the Court's affirmative rules in motorist seizure cases expand the power of the police to advance officer safety or to provide guidance to the officer in the field. On the other hand, bright-line rules that restrict police authority are proper when there is the potential for the abuse of police discretion. The court below correctly announced a clear rule to check the substantial discretion afforded officers who execute traffic detentions.

The ruling below upholds a fundamental principle of this Court's investigative detention cases. The investigative practices used by officers during traffic stops must be strictly tied to the reasons which justify the detention. Once the purpose for the traffic stop has been satisfied, questioning a

motorist about matters unrelated to the stop, absent just cause, is unreasonable. Finally, the decision below will protect the liberty, privacy and security interests of thousands of innocent motorists who otherwise would be delayed in their travel plans and asked to surrender the privacy of their automobiles and luggage without good cause.

ARGUMENT

I. THE CONSENSUAL ENCOUNTER CASES REST ON THE PREMISE THAT THE ORDINARY POLICE-CITIZEN ENCOUNTER IS AN "ARM'S LENGTH" MEETING. THE REASONING OF THOSE CASES IS INAPT WHEN AN OFFICER CONTINUES TO QUESTION A CITIZEN SEIZED FOR A TRAFFIC STOP

Fourth Amendment interests are not triggered unless a "search" or "seizure" has occurred. Not every encounter between an officer and a citizen is a seizure. This Court's cases establish that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)(plurality opinion). If the reasonable person would feel "free to disregard the police and go about his business," *California v. Hodari D.*, 499 U.S. 621, 628 (1991), or "feel free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, 501 U.S. at 436, no seizure has occurred and no reasonable suspicion is required to justify the officer's conduct. Whether a person has been seized depends upon the totality of the circumstances surrounding the encounter. *Id.* at 439-40 (rejecting a *per se* rule deciding the seizure issue on the fact that the police-citizen encounter took place on a bus); *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)(rejecting a bright-line rule for determining

whether a police chase constitutes a seizure).

Thus, the police may approach a person and ask questions, *INS v. Delgado*, 466 U.S. 210, 216 (1984); seek to examine a person's identification or travel documents, *Bostick*, 501 U.S. at 437; *Delgado*, 466 U.S. at 216; *Royer*, 460 U.S. at 501; *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980)(opinion of Stewart, J.); pursue a pedestrian as he runs down the street, *Chesternut*, 486 U.S. at 576; and request consent to search a person's luggage, *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 501. None of these encounters will trigger Fourth Amendment scrutiny provided "the police do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 435; *accord Chesternut*, 486 U.S. at 574 (police chase not a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [Chesternut's] freedom of movement").

Although not mentioned by petitioner or its *amici*, all of the Court's consensual encounter cases have a common trait: each involved persons at liberty to come and go as they please. The status of the individual is crucial because the Court has decided that, as a matter of law, the typical police-citizen encounter will not constitute a seizure even though few persons actually exercise their right to ignore the police. This constitutional norm rests on two related premises. First, the reasonable, innocent person[3] will normally

[3] The test for determining whether a seizure has occurred is an objective standard that "presupposes an *innocent* person." *Bostick*, 501 U.S. 501 U.S. at 438 (emphasis in original); *Chesternut*, 488 U.S. at 574 (the reasonable person test is an objective standard, which "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"). Thus, respondent's subjective belief, elicited on cross-examination at the suppression (continued...)

cooperate with the police and sees the ordinary police-citizen encounter as an "arm's length" meeting designed to serve the community at-large. Second, a contrary rule would bar many valid law enforcement practices, particularly "the need for police questioning as a tool in the effective enforcement of the criminal laws." *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

In contrast to the *Mendenhall-Royer-Bostick* line of cases, the Court has recognized that the objective intrusion, authority of the police, and potential for the abuse of discretionary power involved whenever a motorist is stopped and questioned by the police, raise distinct Fourth Amendment issues. Whenever a police officer stops a motorist in transit, a seizure has occurred. Stopping a vehicle and detaining its occupants is a seizure under the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. at 653. A traffic stop interrupts a motorist's "freedom of movement," is annoying and time consuming, and often generates "substantial anxiety," even for the law-abiding motorist who has not committed a crime. *Id.* at 657. Similarly, when a motorist is stopped and questioned at a sobriety roadblock or other official checkpoint, a seizure has occurred. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

The authority of the police, the dynamics surrounding a

[3] (...continued)
hearing, *see* J.A.29, that he was free to leave the encounter after Newsome returned his driver's license, is not decisive. *See also Hodari D.*, 499 U.S. at 628 (the seizure standard "is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person").

traffic stop and common sense have led this Court to declare that "[c]ertainly few motorists would feel free to either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984).[4] Because of the "unsettling show of authority" and "substantial anxiety" associated with traffic stops, *Prouse*, 440 U.S. at 657, police officers may not approach or signal a motorist in transit to stop and listen to their questions as they can a pedestrian. "Stopping or diverting an automobile in transit . . . is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter." *Mendenhall*, 446 U.S. at 556-57 (opinion of Stewart, J.).

This Court's cases also recognize that police seizures of motorists differ from questions put to pedestrians in another way. Because "[v]ehicle stops for traffic violations occur countless times each day," *Prouse*, 440 U.S. at 659, and every motorist is subject to a "multitude of applicable traffic and equipment regulations," *id.* at 661, -- rules which are not applicable to pedestrians -- police officers have substantial discretion when deciding which motorists to stop and how each stop will be resolved. In this case, for example, Deputy Newsome gave respondent a verbal warning, although he could have issued a speeding ticket. The average motorist is aware of this discretionary authority, which adds to the tension of the typical traffic stop. Because an officer might abuse his or her authority either in deciding which motorists to stop or how those stops will be resolved, this

[4] Many states have laws against resisting or fleeing from an officer's lawful order to stop. *See, e.g.*, Fla.Stat. §316.1935 (Supp. 1996); Ohio Rev. Code Ann. §2921.331 (1994); Nev.Rev.Stat.Ann. §484.348 (Supp. 1995); Wash.Rev. Code §46.61.021 (West Supp. 1996); 75 Pa.Cons. Stat.Ann. §3733 (West Supp. 1995).

Court has imposed constitutional rules for motorist detentions that are not applicable to police-pedestrian encounters.

For example, in *Prouse*, the Court ruled that a discretionary spot-check to verify a motorist's driver's license and registration was unconstitutional. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* at 661. Accordingly, *Prouse* ruled that, absent reasonable suspicion that a motorist has committed a traffic violation or some other offense, randomly detaining a motorist to examine driving documents is unreasonable under the Fourth Amendment. *Id.* at 663. *See also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)(border patrol agents may stop a vehicle near the border and question its occupants only if there is reason to suspect that the car may contain illegal aliens).

Similarly, in *Sitz* and *Martinez-Fuerte*, although the Court rejected Fourth Amendment challenges to a sobriety checkpoint and an interior Border Patrol permanent checkpoint, respectively, it stressed, *inter alia*, the standardized procedures that governed each seizure. In *Sitz*, all vehicles passing through the sobriety checkpoint were stopped and drivers were briefly examined for signs of intoxication. 496 U.S. at 447. Because all drivers approaching the checkpoint were stopped, the seizure did not afford the police the unchecked discretion inherent in the random stops at issue in *Prouse*. *Sitz*, 496 U.S. at 454.[5] Likewise, in *Martinez-Fuerte*, the Court emphasized that permanent checkpoints

[5] *See* 4 Wayne F. LaFave, SEARCH AND SEIZURE §10.8(d) at 706 (3d ed. 1996)("[T]he manner in which the [sobriety] checkpoint is operated must be such that motorists 'realize that they have been stopped as part of a routine checkpoint operation' and not singled out")(footnote omitted).

run by the Border Patrol were not as intrusive on the motoring public as a random roving-patrol. At a fixed checkpoint, motorists "are not taken by surprise" by the presence of the police. 428 U.S. at 559. Moreover, because of the "regularized manner in which established checkpoints are operated . . . field officers may stop only those cars passing the checkpoint [which leaves less] room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Id.*[6]

As the Court's cases illustrate, there are sound reasons why pedestrian encounters and motorist seizures are controlled by different Fourth Amendment rules. When a citizen is approached by the police on the street, inside an airport terminal, or while sitting on a bus, the law operates on the assumption the person remains free to go about his or her business and ignore the officer unless the officer indicates that compliance with his demands is required.[7] Simply stated, the Fourth Amendment treats the typical police-citizen encounter as a balanced meeting: the officer is free to question the citizen, but the citizen is free to walk away from the officer. The arm's length nature of the encounter explains why the Court has repeatedly declared that a person's refusal to cooperate with an officer does not justify, even momentarily, a detention. Nor does a refusal to listen or answer an officer's inquiry provide reasonable grounds to

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[6] *See* LaFave, *supra*, §10.8(d) at 696 (a central theme of *Martinez-Fuerte* is that "a police procedure is less threatening to Fourth Amendment values when the *discretionary* authority of the police (and thus the risk of arbitrary action) is kept at an absolute minimum")(emphasis added).

[7] *Cf. Brown v. Texas*, 443 U.S. 47 (1979)(when police have no suspicion of criminality and appellant refused to identify himself and angrily asserted that the police had no right to stop him, the police unreasonably seized appellant when they detained and frisk him for identification).

detain. *Bostick*, 501 U.S. at 437; *Delgado*, 466 U.S. at 216-17; *Royer*, 460 U.S. at 498 (plurality opinion).

In contrast, a motorist seized by the police is not positioned to ignore the officer or his questions. Once a seizure has occurred, the encounter is no longer balanced and the officer dictates the pace and circumstances of the confrontation. The atmosphere and objective intrusion of the seizure may create fear and distress for many law-abiding motorists. Where a police-citizen confrontation begins in a climate of "substantial anxiety," *Prouse*, 440 U.S. at 657, and is controlled by the discretion of the officer in the field, the totality of the circumstances test of the consensual encounter cases is inapt because it is designed to assess the perspective of citizens at liberty to come and go as they please. Unlike a person free to ignore an inquiring officer, a motorist seized by the police is not positioned to know the lawful limits of the officer's authority, nor the extent of the his own right to leave or terminate the seizure.[8]

The claim pressed by the dissent of Justice Sweeney below, Pet.App.13-14, that this case turns entirely on the issue of consent, is plainly wrong. The issue of whether respondent was lawfully "seized" at the time Deputy Newsome requested consent to search is a distinct question from whether he validly "consented" to the search. Because respondent was unlawfully seized at the time he gave consent to search, the validity of the search turns on whether the consent has been purged of the taint of the illegal seizure.[9] That deter-

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[8] *Cf. Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)(homeowner confronted with an official housing inspector demanding a warrantless entry has "no way of knowing the lawful limits of the inspector's power to search").

[9] *Royer*, 460 U.S. at 501 (plurality opinion)("*Dunaway [v. New York*, 442 U.S. 200, 218-19 (1979)] and *Brown [v. Illinois*, 422 U.S. at 590, (continued...)

mination requires the consideration of three factors: the temporal proximity of the illegal seizure and the consent; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982), quoting *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). The prosecution bears the burden of proving that evidence obtained as a direct result of an illegal seizure is admissible. *Id.*

Here, the continued illegal detention of respondent and the consent to search were intimately connected in time and circumstance. Respondent gave consent instantly; the continued illegal detention and consent were hand-in-glove. As the court below concluded:

> [T]here was no time lapse between the illegal detention and the request to search, nor were there any circumstances that might have served to break or weaken the connection between one and the other. The sole purpose of the continued detention was to illegally broaden the scope of the original detention. [Respondent's] consent clearly was the result of his illegal detention, and was not the result of an act of will on his part.

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[9] (...continued)
601-02 (1975)] hold that statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will"); *see also Bostick*, 501 U.S. at 434 (noting that if a seizure took place without reasonable suspicion, drugs found in Bostick's suitcase after a consent search "must be suppressed as tainted fruit"); *id.* at 447 (Marshall, J., dissenting)(If a person "was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised [the person] was of his right to refuse it").

Pet.App.7. Put simply, there was no "demonstrably effective break in the chain of events leading from the illegal [seizure] to the [consent]." *Brown v. Illinois*, 422 U.S. at 611 (Powell, J., concurring in part). This case therefore is easily distinguishable from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In *Bustamonte*, the Court held that a consent search may still be constitutional even though an officer failed to inform a person of their right to refuse such a search. *Id.* at 248-49. Here, respondent's claim is that his consent invalid because it was inextricably tied to his illegal detention.

II. BECAUSE OF THE NATURE OF THE OBJECTIVE INTRUSION AND THE RISKS AND INTERESTS INVOLVED FOR BOTH THE OFFICER AND MOTORIST, BRIGHT-LINE RULES DO CONTROL MOTORIST SEIZURES

Due to the attendant circumstances and interests at stake for both the officer and the motorist, this Court has adopted bright-line rules to outline the initiation and permissible scope of motorist detentions. The ruling below fits neatly within the framework of the Court's prior motorist seizure cases.

"Bright-line fourth amendment rules come in two forms." Albert W. Alschuler, "Bright Line Fever and the Fourth Amendment," 45 U.Pitt.L.Rev. 227, 242 (1984). Many of this Court's bright-line rules expand the power of the police during motorist detentions, while other bright-line rules check the discretion of the police. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(*per curiam*), is an example of the former category. *Mimms* held that an officer may exercise discretion to order a driver, validly stopped for a traffic violation, to exit his or her vehicle even absent any particularized suspicion that the driver is presently armed and dan-

gerous. This bright-line rule was justified by the twin rationales of officer safety and the minimal intrusion involved for the motorist who has already been lawfully seized. *Id.* at 110-11.

Michigan v. Long, 463 U.S. 1032 (1983), and *New York v. Class*, 475 U.S. 106 (1986), are additional examples of categorical rules articulated by the Court that expand the authority of the police during traffic stops. In *Long*, officers on patrol in a rural area observed Long's car travelling erratically and speeding. After the officers saw the car drive into a ditch, they stopped to investigate. When Long, who appeared to be intoxicated, headed toward his car to produce his vehicle registration, the officers followed and observed a large hunting knife inside the car. After a frisk of Long's person revealed no weapons, an officer searched the inside of the car for other weapons. The search revealed a quantity of marijuana. 463 U.S. at 1034.

Prior to *Long*, the Court had not approved an investigative search of a car without probable cause to believe that contraband or evidence of a crime was within the vehicle. Yet, *Long* held that a protective search of the passenger compartment is permissible when police have a reasonable belief that an occupant of a car is dangerous and may gain immediate control of weapons. *Id.* at 1050. This expansion of police authority was justified by the recognition that motorist seizures "are especially fraught with danger to police officers," and that "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed." *Id.*[10]

[10] While *Long* noted that its ruling "does not mean that police may conduct automobile searches *whenever* they conduct an investigative stop," 463 U.S. at 1050, n.14 (emphasis in original), they are free to do so when they have "the level of suspicion identified in *Terry*." *Id.*

In *New York v. Class*, 475 U.S. 106, the question before the Court was whether "a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN [Vehicle Identification Number] after its driver has been stopped for a traffic violation and has exited the car." *Id.* at 107. In *Class* it was "undisputed that the police officers had no reason to suspect that [Class'] car was stolen, that it contained contraband, or that [Class] had committed an offense other than the traffic violations." *Id.* at 108. And the *Class* Court recognized that an officer's reaching into a car to move the papers covering the VIN was a search under the Fourth Amendment. *Id.* at 111.

Despite the absence of probable cause justifying a search, the *Class* Court ruled that the search of the Class' vehicle was reasonable. Relying on the reasoning of *Mimms*, the Court identified three factors that made the search constitutional: the search promoted the safety of the officers; the search was minimally intrusive; and the search stemmed from directly observing Class commit a traffic violation. *Id.* at 115. Consequently, a police search may be "piggy-backed" onto a traffic stop whenever there is a need to move objects obscuring the VIN.

Finally, in *New York v. Belton*, 453 U.S. 454 (1981), an officer stopped a car for speeding. While requesting identification from the occupants of the vehicle, the officer smelled the odor of burnt marijuana. After ordering the occupants out of the car, the officer searched the passenger compartment, including the pocket of a jacket belonging to Belton. Inside the pocket was cocaine. The search raised an issue that had generated conflicting results in the lower courts, namely, the proper scope of a search of the interior of a car incident to a lawful arrest of its occupants.

Emphasizing the need for a bright-line rule to guide to officers in the field, *Belton* ruled that "when a policeman

has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment [and any closed containers therein] of that automobile." *Id.* at 460 (footnote omitted). The ruling in *Belton*, like the definitive rulings in *Mimms*, *Long* and *Class*, augmented the power of officers conducting traffic detentions.

In comparison to the affirmative rules discussed above which extend police power, bright-lines sometimes work to check police discretion. As noted, the result in *Prouse* is a classic example of a peremptory rule that reduces the power to search and seize. When there is a "'grave danger' of abuse of discretion," 440 U.S. at 662, the *Prouse* Court reaffirmed that categorical rules are necessary to check the discretion of officers who might use their authority to undermine Fourth Amendment interests.[11] The same concerns are extant in this case.

Every law-abiding motorist will sometime commit a traffic violation. As Justice Stevens has properly noted, "to be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky." *Sitz*, 496 U.S. at 465 (Stevens, J., dissenting). Thus, even the most innocent motorist faces the likelihood of being seized for a traffic violation. When such a seizure occurs, the officer not only controls the pace and scope of the seizure,[12] the officer

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[11] *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) ("The search [of petitioner's car] was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara [v. Municipal Court*, 387 U.S. 523, 532-33 (1967)] when it insisted that the 'discretion of the officer in the field' be circumscribed").

[12] *Cf. New York v. Banks*, 650 N.E. 2d 833, 835 (N.Y.Ct.App. 1995) (continued...)

also retains substantial discretion in deciding how and when the seizure will end. The ruling below announces a sensible and easily administered safeguard to restrain the considerable discretion held by officers during traffic stops.

Just as this Court acknowledged few motorists would feel free to disobey a police signal to stop or to depart the scene of a traffic stop "without being told they might do so," *Berkemer v. McCarty*, 468 U.S. at 436, the court below wisely concluded that an equally small number of motorists will be aware of the legal limits of an officer's authority during a traffic seizure:

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[12] (...continued)
(State trooper "readily admitted that he delayed issuing the traffic tickets and returning the licenses and rental agreement to defendant and Jones for the specific purpose of effecting a search of the automobile"); *Powell v. Florida*, 649 So.2d 888, 889 (Fla.Ct.App. 1995)("It is clear from [the officer's] testimony that once he stopped the vehicle, no matter what event transpired subsequent to the initial stop, he would have conducted an exterior search with the K-9 unit [drug sniffing dog] because, [the officer] testified, he did so in virtually all traffic stops"); *United States v. Buchanon*, 72 F.3d 1217, 1228 (6th Cir. 1995)(State trooper "testified that as part of his drug interdiction unit's investigative method, he 'automatically' uses Fando [trooper's drug sniffing dog] to perform a narcotics sniff on every vehicle his unit stops"). Jeff Brazil, "Videotape Gives A Look at Volusia Squad's Tactics," Orlando Sentinel Trib., June 17, 1992 (Police videotape showed that "[w]hen one motorist refused a [consent] search, a drug dog was escorted around the car twice. Deputies searched the man's car. Nothing was found"); Jeff Brazil & Steve Berry, "Seizing Cash is no Sweat for Deputies," Orlando Sentinel Trib., June 14, 1992 ("What happened after cars were ordered to the roadside is the key. Once the deputy issued a warning or -- in rare cases -- a citation, he would turn and begin walking away, according to dozens of drivers interviewed. The deputy then would pause, return to the car and ask permission to search. In most cases, drivers consented. Records show that at least a handful of drivers initially refused to allow a search. They were told they would be detained until a drug-sniffing dog could be summoned. The drivers allowed the searches").

> Most [motorists] believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person [who has been seized for a traffic violation] would not feel free to walk away as the officer continues to address him.

Pet.App.9.

The consequence of the petitioner's position is manifest: according to petitioner, officers should be afforded the discretion to continue questioning otherwise innocent motorists about matters unrelated to a traffic stop even when there is no reasonable suspicion to justify continuing the seizure. The fact that many thousands of innocent motorists will be subjected to this police power, or will not object to officer's search of their cars,[13] is beside the point. As Justice O'Connor declared last Term, "evenhanded treatment [is] no substitute for the individualized suspicion requirement." *Vernonia School Dist. 47J v. Acton*, 515 U.S. __, __, 115 S.Ct. 2386, 2398 (1995)(dissenting opinion). "Protection of privacy, not evenhandness, was [for the Framers] and is now the touchstone of the Fourth Amendment." *Id.* at 2399.

In sum, a review of this Court's motorist seizure cases indicates that bright-line rules which *expand* police power to search and seize are often appropriate constitutional norms to promote officer safety and provide guidance to officers in the field. But bright-line rules cut both ways. This Court's cases equally reveal that definitive rules which *restrain* police power are proper where there is the potential for the abuse of police discretion. The court below properly announced a clear rule to control the discretion of the officer in the field, "at least to some extent." *Prouse*, 440 U.S. at 661. A contrary ruling -- to allow an officer to continue questioning an innocent motorist about matters unrelated to the traffic stop when there is no cause for such interrogation -- sanctions the very evil condemned in *Prouse*.[14]

[13] Daniel L. Rotenberg, "An Essay on Consent(less) Police Searches," 69 Wash.U.L.Q. 175, 187-90 (1991).

III. THE INVESTIGATIVE TECHNIQUES OF THE POLICE DURING TRAFFIC STOPS MUST BE STRICTLY TIED TO THE REASONS WHICH JUSTIFY THE DETENTION. ONCE THE PURPOSE FOR THE TRAFFIC STOP HAS BEEN SATISFIED, CONTINUED QUESTIONING OF MOTORISTS ABOUT MATTERS UNRELATED TO THE STOP, ABSENT JUST CAUSE, IS UNREASONABLE

When considering challenges to police intrusions that occur in the context of a motorist detention, the Court has always looked to the reasonableness component of the Fourth Amendment. As stated in *Prouse*, 440 U.S. at 654, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Traditionally, the reasonableness standard demands, "at a minimum," that intrusions by the police "be capable of measurement against 'an objective

[14] *Cf. Ohio v. Chatton*, 463 N.E.2d 1237, 1240 (Ohio Sup.Ct. 1984) (where officer "no longer maintained a reasonable suspicion that [motorist's] vehicle was not properly licensed or registered, to further detain [motorist] and demand that he produce his driver's license is akin to the random detentions struck down" in *Prouse*).

standard,' whether this be probable cause or a less stringent test [of suspicion]." *Id.* (footnotes omitted); *Acton*, 115 S.Ct. at 2402 (O'Connor, J., dissenting)("history and precedent establish that individualized suspicion is 'usually required' under the Fourth Amendment (regardless of whether a warrant and probable cause are also required)").

The definitive statement of the Fourth Amendment's objective standard for judging the legality of intrusions falling short of an arrest or full search was announced in *Terry v. Ohio*, 392 U.S. at 19-20: "[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one -- whether the officer's actions was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." The ruling below, which requires an officer to signal the termination of the stop before continuing to question a motorist about matters outside of the scope of the valid detention, sustains the principles required by this Court's rulings for evaluating the legality of motorist seizures.

Motorists enjoy significant interests in automobile travel that are protected by the Fourth Amendment. *Prouse*, 440 U.S. at 662-63. Where, however, an officer has reasonable grounds that a traffic violation or other offense is in progress, a limited detention is proper. Under this Court's precedents, while the police are not necessarily required to utilize the "least restrictive means" available in completing an investigative stop,[15] they must ensure that the stop "be temporary and last no longer than necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 500 (plurality opinion); *accord*, *Brignoni-Ponce*, 422 U.S. at 881 ("the stop and inquiry must be 'reasonably related in scope to the justification for their initiation'"), quoting *Terry*, 392 U.S.

[15] *See United States v. Sharpe*, 470 U.S. 675, 687 (1985).

29; *cf. Sharpe*, 470 U.S. at 685-86 (investigative detention of motorist must be brief and police must diligently pursue a means of investigation that will likely confirm or dispel their suspicions quickly).

The ruling below advances the constitutional command required of all temporary seizures, including traffic stops, that an officer's investigative practices "must be 'strictly tied to and justified by' the circumstances which render its initiation permissible." *Terry*, 392 U.S. at 19 (citations omitted). Indeed, the decision below follows a long line of lower court rulings that have held that the police, in the context of a valid traffic stop, may not question a motorist about matters unrelated to the traffic stop, unless there is independent cause for such questioning.[16]

[16] *See, e.g., United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994) (once trooper realized that reasons for traffic stop were unwarranted, the stop should have terminated and trooper's questions and request for driver's license of motorist violated the Fourth Amendment); *United States v. Walker*, 933 F.2d 812, 817 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1168 (1992)(holding that when a defendant, stopped for speeding, established to the police officer that he had a license and was entitled to operate the vehicle, the officer's further detention for questioning about guns and drugs was illegal); *United States v. Thomas*, 863 F.2d 622, 628-629 (9th Cir. 1988)(where suspect at a traffic stop had satisfied the reasonable suspicion giving rise to the stop, continued detention for questioning about a gun was illegal); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2015 (1995)(stating that, if the driver provides no inconsistent answers and no objective circumstances supply a police officer with additional suspicion, the officer should not expand the scope of the stop); *State v. Washington*, 623 So. 2d 392, 397 (Ala.Crim.App. 1993)(once the defendant signed his speeding ticket, he should have been released by the detaining officer absent further reasonable suspicion; further questioning quickly evolved into an illegal detention); *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir. 1994)(holding that once the circumstances giving rise to a stop are resolved, the detainee must be released); *Colorado v. Redinger*, 906 P.2d

(continued...)

The position of petitioner conflicts with the demands of this Court's Fourth Amendment holdings that investigative seizures be "strictly circumscribed by the exigencies which justify its initiation." *Terry*, 392 U.S. at 26. When the police have reasonable suspicion (but not probable cause) of criminal activity, the balancing formula used by the Court provides sufficient flexibility for an officer to conduct her investigation in a manner that is "likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686. When an officer is "diligently pursu[ing]" her investigation, *United States v. Place*, 462 U.S. 696, 709 (1983), this Court will not subject an officer's conduct to "unrealistic second-guessing" on alternative means of investigation. *Sharpe*, 470 U.S. at 686-87.

On the other hand, when the reasons for commencing the investigation have been satisfied, further intrusions and interrogation are unreasonable. In the context of a traffic stop, once the purpose for the stop has been fulfilled and no additional grounds for continuing the seizure exist, questioning a motorist about matters unrelated to the stop violates the cardinal rule that an officer's conduct be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

Here, once Deputy Newsome had determined that respondent was lawfully on the road and would be issued a verbal warning for speeding, the purposes for stopping respondent were completed. Instead of terminating the seizure at this point, and without any suspicion of criminality, Newsome continued his "routine" of questioning respondent about guns and contraband.[17] There was no nexus between this questioning and the reasons for stopping respondent. It

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[16] (...continued)
81 (Col.Sup.Ct. 1995)("[w]hen . . . the purpose for which the investigatory [traffic] stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens")(footnote omitted); and *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir.), *cert. denied*, 113 S.Ct. 2427 (1993)(asserting agreement with the Tenth Circuit that "extensive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment")(*dicta*). *See also* LaFave, *supra*, §9.2(f) at 53, n.143 & 61-62 ("[I]f a person is stopped on suspicion that he has just engaged in criminal activity, but the suspect identifies himself satisfactorily and investigation establishes that no offense has occurred, there is no basis for further detention, and the suspect must be released").

Concerning petitioner's claim that a motorist in respondent's shoes is no longer subject to seizure after his driver's license has been returned, Professor LaFave has reasoned as follows:

> T[his] conclusion is hard to swallow. Given the fact that [a motorist] quite clearly ha[s] been seized when his car was pulled over, the return of [his driving papers] hardly manifests a change in status when it was immediately followed by interrogation concerning other criminal activity.

LaFave, *supra*, §9.3(a) at 112 (footnote omitted).

[17] Deputy Newsome testified at the suppression hearing that it was his routine practice to ask permission to search a motorist's car during traffic stops. J.A.22. The appellate court below was obviously aware of Newsome's "routine." *See* Pet.App.18, citing *Ohio v. Retherford*, 639 N.E.2d 498, 503 (Ohio Ct.App. 1994). In *Retherford*, the court stated:

> As a result of Deputy Newsome's testimony in this case, and of testimony in other cases currently pending before this court, it has become clear to us that some police agencies in Ohio are instructing their officers to routinely ask for the consent of individuals stopped for traffic violations to search their vehicles and its contents for drugs, weapons, or large sums of money, even when the officer has little or no suspicion that the occupants of the vehicle are engaged in criminal activity whatsoever, or that the vehicle itself contains any contraband (footnote omitted).

was, as the court below correctly observed, "a fishing expedition for unrelated criminal activity." Pet.App.10. Newsome's questions were not justified by a reasonable belief that contraband was inside respondent's vehicle. Rather, they were part of a carefully scripted routine designed to exploit the vulnerable status of a motorist subjected to a police seizure. Accordingly, Deputy Newsome's conduct exceeded the permissible bounds of a valid traffic stop. Once the purposes for the stop were satisfied, any further interrogation of respondent, absent reasonable cause, was an unlawful and arbitrary continuation of respondent's seizure and thus unreasonable under this Court's precedents.[18]

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[18] The Solicitor General, as *amicus curiae*, claims that the ruling below imposes a "burdensome and mechanical requirement of formal notification upon law enforcement officers." Brief for the United States at 23 (footnote omitted). This is a surprising statement for at least two reasons. First, the requirement of notifying a motorist that the seizure is over is certainly no more "burdensome" or "mechanical" than the self-described "technique" that Deputy Newsome uses whenever he makes a traffic stop. *See Ohio v. Retherford*, 639 N.E.2d at 502:

> [W]hen asked why he felt the need to ask Retherford for her consent to search her vehicle, Deputy Newsome replied, "[m]ore so for any other reason the fact that I need the practice, to be quite honest." Deputy Newsome further testified that, in 1992 alone, he asked for consent to search a vehicle incident to a traffic stop "approximately 786 times . . . give or take a few."

Second, the requirement of notification will only be "burdensome" when officers want to question a motorist, who is otherwise constitutionally entitled to depart the scene, about matters unrelated to the officer's seizure of the motorist. If an officer's conduct and inquiries are reasonably related to the purposes of the stop -- in other words, if the officer obeys the holdings of this Court's precedents -- there will be no additional or "burdensome" notification requirements because the seizure will have been terminated and no arbitrary questions about drugs, guns or contraband will be asked unless there is good reason for such questions.

IV. THE RULING BELOW WILL PROTECT THE PRIVACY, LIBERTY AND SECURITY INTERESTS OF MILLIONS OF INNOCENT MOTORISTS WHO OTHERWISE WOULD BE DELAYED IN THEIR TRAVEL PLANS AND ASKED TO SURRENDER THE PRIVACY OF THEIR AUTOMOBILES AND LUGGAGE WITHOUT GOOD CAUSE

Petitioner and its *amici* suggest that the ruling below is without constitutional basis and imposes a rigid, unnecessary burden on law enforcement officers. In their view, a notification requirement serves no legitimate Fourth Amendment interests. This assessment is gravely mistaken. The ruling below will help discourage what many innocent motorists have already experienced -- an arbitrary, suspicionless accusation and intrusion.

One Ohio appellate court that reviewed the testimony of Deputy Newsome and other law enforcement officers describing how and why they request consent to search the vehicles of motorists stopped for routine traffic violations did not mince words when it commented:

> What is obviously troubling about these cases is that hundreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travel and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to "practice" his drug interdiction technique. While we recognize the importance of drug interdiction, we are shocked by what we believe to be an unjustified and egregious intrusion upon the privacy rights of the citizens of Ohio.

Ohio v. Retherford, 639 N.E.2d at 503-04. The citizens of

Ohio are not the only innocent motorists who have been subjected to a capricious police practice. Instances of innocent motorists being stopped for minor traffic violations and subjected to police accusation, questioning and search extending far beyond constitutional limits are easy to find:

> George Karnes, [a business man from California was stopped outside Allentown, Pa. for speeding. After issuing a ticket, Trooper Thomas Skrutski] asked to search [Karnes'] car, but Karnes said no . . . . But the trooper didn't let Karnes go. He called K-9 officer Edward Kowalski, who arrived with his drug detection dog about 20 minutes later . . . . [Kowalski] also asked Karnes to allow a search. But Karnes refused, so Kowalski brought out his drug dog. Twice the dog sniffed its way around the car, detecting no drugs. Finally -- two and a half hours after the initial stop -- the troopers let Karnes go.[19]
>
> In Maryland . . . Trooper Hughes pulled over a rental car that he said was speeding [on] Interstate 68. The car carried four black men on their way back from a relative's funeral in Chicago to Washington, D.C. When Hughes asked to search the car, [an occupant] identified himself as a Washington, D.C. public defender who was trying to make a 9:30 a.m. court appearance . . . . Denied permission [to search], the trooper detained the men for nearly an hour while a drug-sniffing dog was summoned. The dog found nothing, and the men were sent on their way with a $105 speeding ticket.[20]

Police videotapes of roadside searches by sheriff deputies of Volusia County, Florida reveal what many innocent motorists have experienced after being stopped for traffic violations that rarely result in tickets being issued:

> The tapes revealed a pattern -- one that fairly represents procedures used on the interstate -- in which deputies stop minority motorists for flimsy reasons, then trick them or coerce them into allowing their vehicles to be searched.
>
> Deputies set up the motorists by using a subtle but sophisticated -- and effective -- psychological tool. They question them in friendly, conversational tones: Where is the motorist going? Where has the motorist been? Whom is the motorist visiting?
>
> After telling them they can leave, the deputies suddenly ask if they are carrying drugs, weapons or explosives and whether they will consent to a search.
>
> Most people want to cooperate with police -- either out of fear or respect. Their inclination is to allow cops to search their vehicles . . . . [One motorist], who is black, calmly answered the officer's questions. There was no obvious reason to suspect her as a drug dealer and no legitimate reason to search her car. The deputy lectured her on the proper use of the emergency lane and told her she was free to go. Then he pulled that oh-by-the-way routine and

[19] Kate Shatzkin & Joe Hallinan, "Highway Dragnets Seek Drug Couriers -- Police Stop Many Cars for Searches," Seattle Times, Sept. 3, 1992.

[20] Mark Pazniokas, "Discrimination by Police Often Hard to Prove," Hartford Courant, May 2, 1994.

> searched her car. [No drugs or cash were found] . . . .
>
> Motorists who stand up for their rights and refuse permission to search, still are detained by deputies. [Another police tape] showed a video in which a security guard, who is black, refused a deputy's request to search his car. The deputy called for a police dog that "alerted" to drugs and the car was searched. No drugs or cash were found.[21]

Although officers often seek consent searches as a part of their "routine" practice or "technique," the experience for the innocent motorist is no routine matter. A consent search by a Maryland state trooper of a car stopped for speeding went as follows:

> "Using a screwdriver and a flashlight, [the trooper] loosened door panels, raised the dashboard, looked into the exhaust pipe, checked the spare tire and inspected under the hood . . . . [The search] took about 30 minutes. [The trooper] found nothing and then called for a trained German shepherd to sniff around. It too found nothing."[22]
>
> Even those who agree to let police search their car may be in for more than they expected. Craig Kirby, a 30-year-old Alabama textile worker, was stopped in July 1990 as he drove on I-10 through Jefferson Davis Parish in southwestern Louisiana. When the officer asked him whether he could search the car, Kirby said: "Fine." The next thing he knew, Kirby was spread-eagled against the side of his car. The officer searched his luggage and trunk and looked under his hood and dashboard. But the search didn't stop there. The officer, Kirby said, made him drive to a gas station, where he had mechanics take apart his spare tire. The officers also disassembled his seats, he said. They found no drugs and told Kirby he was free to go. The ordeal lasted an hour and a half.[23]

Members of this Court have expressed strong disapproval of suspicionless intrusions that may affect thousands or millions of innocent persons.[24] This Court has also acknowledged that many citizens "find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of

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[21] Bo Poertner, "Tapes Show Rights Given Up Readily," Orlando Sentinel, Aug. 13, 1994.

[22] Michael Janofsky, "In Drug Fight, Police Now Take to the Highway," N.Y. Times, Mar. 5, 1995.

[23] Shatzkin & Hallinan, *supra*.

[24] *Acton*, 115 S.Ct. at 2403 (O'Connor, J., dissenting)("[A] suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy considerations"); *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting)("[T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others -- perhaps those with more expansive cars, or different bumper stickers, or different-colored skin -- may escape it entirely"); *cf. Illinois v. Krull*, 480 U.S. 340, 365 (1987)(O'Connor, J., dissenting) (noting a significant difference between an invalid search warrant that targets only one person and a legislature's illegal authorization of suspicionless searches that "may affect thousands or millions and will almost always affect more than one").

travel." *Prouse*, 440 U.S. at 662. If petitioner prevails, millions of innocent travelers may experience, subject to the discretion of the officer in the field, an arbitrary police "technique" that threatens their liberty, privacy, and security every time their vehicle is stopped for a traffic infraction. That result cannot be reconciled with the Fourth Amendment's "most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people." *Acton*, 115 S.Ct. at 2404 (O'Connor, J., dissenting).

CONCLUSION

For the reasons stated above, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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Dated: June 4, 1996